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A Limited Liability Partnership
Including Professional Corporations
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Attorneys for Defendant
KAISER FOUNDATION HEALTH PLAN, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

GRACE SMITH and RUSSELL RAWLINGS, on behalf of themselves and all others similarly situated, and CALIFORNIA FOUNDATION FOR INDEPENDENT LIVING CENTERS, a California nonprofit corporation,

Plaintiffs,

v.

MARY WATANABE, in her capacity as Director of the California Department of Managed Health Care; CALIFORNIA DEPARTMENT OF MANAGED HEALTH CARE; and KAISER FOUNDATION HEALTH PLAN, INC.,

Defendants.

Case No. 4:21-cv-07872-HSG

DECLARATION OF ALEXANDER KULJIS IN SUPPORT OF KAISER FOUNDATION HEALTH PLAN, INC.'S MOTION TO COMPEL ARBITRATION

Date: April 28, 2022
Time: 2:00 p.m.
Room: 2
Judge: Hon. Haywood S. Gilliam, Jr.

DECLARATION OF ALEXANDER KULJIS

I, Alexander Kuljis, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am an associate with the law firm of Sheppard, Mullin, Richter & Hampton LLP, attorneys of record for Kaiser Foundation Health Plan, Inc. ("Kaiser") in this action. If called as a witness, I could and would competently testify to all facts within my personal knowledge except where stated upon information and belief. I make this declaration in support of Kaiser's Motion to Compel Individual Arbitration and Stay Proceedings.

2. Attached hereto as Exhibit A is a true and correct copy of a letter sent by my colleague Moe Keshavarzi to Plaintiffs' counsel requesting arbitration of Plaintiffs' claims.

3. Plaintiffs' counsel have not yet responded to the letter.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on this 4th day of February, 2022, at Los Angeles, California.

/s/ Alexander Kuljis
Alexander Kuljis

Exhibit A

SheppardMullin

Sheppard, Mullin, Richter & Hampton LLP
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Los Angeles, California 90071-1422
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February 3, 2022

VIA E-MAIL AND U.S. MAIL

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Silvia Yee
Carly A. Myers
Disability Rights Education and Defense Fund
3075 Adeline Street, Suite 210
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E-Mail: ccenter@dredf.org
syee@dredf.org
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101 Mission Street, Sixth Floor
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mnunez@rbgg.com

Re: Smith, et al., v. DMHC, et al., Case No. 4:21-cv-07872

Dear Counsel:

As you know, we represent Defendant Kaiser Foundation Health Plan, Inc. ("Kaiser") in defense against the claims filed by your clients Grace Elizabeth Smith and Russell Rawlings. Consistent with Plaintiffs' arbitration agreements, we write now to demand that Plaintiffs stipulate to arbitrate their disputes and to stay the court action pending arbitration.

Plaintiffs Agreed To Binding Arbitration

Ms. Smith has been a Kaiser member since 2017. In 2017, and in each year since, Ms. Smith agreed to a membership agreement, including a health plan and evidence of coverage ("EOC"). Every one of Ms. Smith's EOCs since 2017 has included a binding arbitration provision. Additionally, in her enrollment application in 2017, Ms. Smith agreed to binding arbitration for disputes "arising out of or related to membership in KFHP, including any claim . . . relating to the coverage for, or delivery of, services or items, irrespective of legal theory."

The binding arbitration provision of Ms. Smith's EOC similarly requires Ms. Smith to submit to binding arbitration any claim that "arises from or is related to an alleged violation of any duty incident to or arising out of or relating to this EOC or a Member Party's relationship to Kaiser Foundation Health Plan, Inc. ("Health Plan"), including any claim . . . relating to the coverage for, or delivery of, services or items, irrespective of the legal theories upon which the claim is asserted." Excerpts from Ms. Smith's EOC for 2021, including the binding arbitration provision, are attached for your reference.

Mr. Rawlings has been a Kaiser member since 2020. In 2020, and each year since, Mr. Rawlings agreed to a membership agreement, including a health plan and EOC. Every one of Mr. Rawlings' EOCs since 2020 has included a binding arbitration provision. Additionally, in his

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enrollment application in 2020, Mr. Rawlings agreed to binding arbitration for disputes "arising out of or related to membership in the Health Plan, including any claim . . . relating to the coverage for, or delivery of, services or items, irrespective of legal theory. . . ."

The binding arbitration provision of Mr. Rawlings' EOC similarly requires Mr. Rawlings to submit to binding arbitration any claim that "arises from or is related to an alleged violation of any duty incident to or arising out of or relating to this *EOC* or a Member Party's relationship to Kaiser Foundation Health Plan, Inc. ("Health Plan"), including any claim . . . relating to the coverage for, or delivery of, services or items, irrespective of the legal theories upon which the claim is asserted." Excerpts from Mr. Rawlings EOC for 2021, including the binding arbitration provision, are attached for your reference.

The Arbitration Provisions Apply to Plaintiffs' Claims Here

Plaintiffs are Kaiser members that allege that Kaiser's coverage limitations for wheelchair costs violate Section 1557 of the Affordable Care Act and ERISA. Therefore, both claims in Plaintiffs' First Amended Complaint undeniably arise from and relate to coverage for, or delivery of, services or items.

For these reasons, Kaiser demands that both Ms. Smith and Mr. Rawlings submit their disputes to binding arbitration under the terms of their membership agreements. Please let us know whether Plaintiffs will stipulate to submit these matters to arbitration as agreed. If not, Kaiser will proceed with its motion to compel arbitration.

We look forward to hearing from you.

Sincerely,

Moe Keshavarzi
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

Enclosure

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Kaiser Foundation Health Plan, Inc.
Northern California Region

A nonprofit corporation

EOC #5 - Kaiser Permanente for Small Business Combined Evidence of Coverage and Disclosure Form for THROUGH THE LOOKING GLASS

Kaiser Permanente Gold 80 HMO 500/30 + Child Dental Alt
Group ID: 718772 *EOC* Number: 5

December 1, 2020, through November 30, 2021

Member Service Contact Center
24 hours a day, seven days a week (except closed holidays)
1-800-464-4000 (TTY users call **711**)
kp.org

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debilitating condition and that standard therapies have not been effective in improving your condition, or that standard therapies would not be appropriate, or that there is no more beneficial standard therapy we cover than the therapy being requested. "Life-threatening" means diseases or conditions where the likelihood of death is high unless the course of the disease is interrupted, or diseases or conditions with potentially fatal outcomes where the end point of clinical intervention is survival. "Seriously debilitating" means diseases or conditions that cause major irreversible morbidity

- If your treating physician is a Plan Physician, he or she recommended a treatment, drug, device, procedure, or other therapy and certified that the requested therapy is likely to be more beneficial to you than any available standard therapies and included a statement of the evidence relied upon by the Plan Physician in certifying his or her recommendation
- You (or your Non–Plan Physician who is a licensed, and either a board-certified or board-eligible, physician qualified in the area of practice appropriate to treat your condition) requested a therapy that, based on two documents from the medical and scientific evidence, as defined in California Health and Safety Code Section 1370.4(d), is likely to be more beneficial for you than any available standard therapy. The physician's certification included a statement of the evidence relied upon by the physician in certifying his or her recommendation. We do not cover the Services of the Non–Plan Provider

Note: You can request IMR for experimental or investigational denials at any time without first filing a grievance with us.

Office of Civil Rights Complaints

If you believe that you have been discriminated against by a Plan Provider or by us because of your race, color, national origin, disability, age, sex (including sex stereotyping and gender identity), or religion, you may file a complaint with the Office of Civil Rights in the United States Department of Health and Human Services ("OCR").

You may file your complaint with the OCR within 180 days of when you believe the act of discrimination occurred. However, the OCR may accept your request after six months if they determine that circumstances prevented timely submission. For more information on the OCR and how to file a complaint with the OCR, go to **hhs.gov/civil-rights**.

Additional Review

You may have certain additional rights if you remain dissatisfied after you have exhausted our internal claims and appeals procedure, and if applicable, external review:

- If your Group's benefit plan is subject to the Employee Retirement Income Security Act ("ERISA"), you may file a civil action under section 502(a) of ERISA. To understand these rights, you should check with your Group or contact the Employee Benefits Security Administration (part of the U.S. Department of Labor) at **1-866-444-EBSA (1-866-444-3272)**
- If your Group's benefit plan is not subject to ERISA (for example, most state or local government plans and church plans), you may have a right to request review in state court

Binding Arbitration

For all claims subject to this "Binding Arbitration" section, both Claimants and Respondents give up the right to a jury or court trial and accept the use of binding arbitration. Insofar as this "Binding Arbitration" section applies to claims asserted by Kaiser Permanente Parties, it shall apply retroactively to all unresolved claims that accrued before the effective date of this *EOC*. Such retroactive application shall be binding only on the Kaiser Permanente Parties.

Scope of arbitration

Any dispute shall be submitted to binding arbitration if all of the following requirements are met:

- The claim arises from or is related to an alleged violation of any duty incident to or arising out of or relating to this *EOC* or a Member Party's relationship to Kaiser Foundation Health Plan, Inc. ("Health Plan"), including any claim for medical or hospital malpractice (a claim that medical services or items were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered), for premises liability, or relating to the coverage for, or delivery of, services or items, irrespective of the legal theories upon which the claim is asserted
- The claim is asserted by one or more Member Parties against one or more Kaiser Permanente Parties or by one or more Kaiser Permanente Parties against one or more Member Parties

- Governing law does not prevent the use of binding arbitration to resolve the claim

Members enrolled under this *EOC* thus give up their right to a court or jury trial, and instead accept the use of binding arbitration except that the following types of claims are not subject to binding arbitration:

- Claims within the jurisdiction of the Small Claims Court
- Claims subject to a Medicare appeal procedure as applicable to Kaiser Permanente Senior Advantage Members
- Claims that cannot be subject to binding arbitration under governing law

As referred to in this "Binding Arbitration" section, "Member Parties" include:

- A Member
- A Member's heir, relative, or personal representative
- Any person claiming that a duty to him or her arises from a Member's relationship to one or more Kaiser Permanente Parties

"Kaiser Permanente Parties" include:

- Kaiser Foundation Health Plan, Inc.
- Kaiser Foundation Hospitals
- KP Cal, LLC
- The Permanente Medical Group, Inc.
- Southern California Permanente Medical Group
- The Permanente Federation, LLC
- The Permanente Company, LLC
- Any Southern California Permanente Medical Group or The Permanente Medical Group physician
- Any individual or organization whose contract with any of the organizations identified above requires arbitration of claims brought by one or more Member Parties
- Any employee or agent of any of the foregoing

"Claimant" refers to a Member Party or a Kaiser Permanente Party who asserts a claim as described above. "Respondent" refers to a Member Party or a Kaiser Permanente Party against whom a claim is asserted.

Rules of Procedure

Arbitrations shall be conducted according to the *Rules for Kaiser Permanente Member Arbitrations Overseen by the Office of the Independent Administrator* ("Rules of Procedure") developed by the Office of the Independent Administrator in consultation with Kaiser Permanente and the Arbitration Oversight Board. Copies of the Rules of Procedure may be obtained from our Member Service Contact Center.

Initiating arbitration

Claimants shall initiate arbitration by serving a Demand for Arbitration. The Demand for Arbitration shall include the basis of the claim against the Respondents; the amount of damages the Claimants seek in the arbitration; the names, addresses, and telephone numbers of the Claimants and their attorney, if any; and the names of all Respondents. Claimants shall include in the Demand for Arbitration all claims against Respondents that are based on the same incident, transaction, or related circumstances.

Serving Demand for Arbitration

Health Plan, Kaiser Foundation Hospitals, KP Cal, LLC, The Permanente Medical Group, Inc., Southern California Permanente Medical Group, The Permanente Federation, LLC, and The Permanente Company, LLC, shall be served with a Demand for Arbitration by mailing the Demand for Arbitration addressed to that Respondent in care of:

Kaiser Foundation Health Plan, Inc.
Legal Department
1950 Franklin St., 17th Floor
Oakland, CA 94612

Service on that Respondent shall be deemed completed when received. All other Respondents, including individuals, must be served as required by the California Code of Civil Procedure for a civil action.

Filing fee

The Claimants shall pay a single, nonrefundable filing fee of $150 per arbitration payable to "Arbitration Account" regardless of the number of claims asserted in the Demand for Arbitration or the number of Claimants or Respondents named in the Demand for Arbitration.

Any Claimant who claims extreme hardship may request that the Office of the Independent Administrator waive the filing fee and the neutral arbitrator's fees and expenses. A Claimant who seeks such waivers shall complete the Fee Waiver Form and submit it to the Office of the Independent Administrator and simultaneously serve it upon the Respondents. The Fee Waiver Form sets forth the criteria for waiving fees and is available by calling our Member Service Contact Center.

Number of arbitrators

The number of arbitrators may affect the Claimants' responsibility for paying the neutral arbitrator's fees and expenses (see the Rules of Procedure).

If the Demand for Arbitration seeks total damages of $200,000 or less, the dispute shall be heard and determined by one neutral arbitrator, unless the parties otherwise agree in writing after a dispute has arisen and a request for binding arbitration has been submitted that the arbitration shall be heard by two party arbitrators and one neutral arbitrator. The neutral arbitrator shall not have authority to award monetary damages that are greater than $200,000.

If the Demand for Arbitration seeks total damages of more than $200,000, the dispute shall be heard and determined by one neutral arbitrator and two party arbitrators, one jointly appointed by all Claimants and one jointly appointed by all Respondents. Parties who are entitled to select a party arbitrator may agree to waive this right. If all parties agree, these arbitrations will be heard by a single neutral arbitrator.

Payment of arbitrators' fees and expenses

Health Plan will pay the fees and expenses of the neutral arbitrator under certain conditions as set forth in the Rules of Procedure. In all other arbitrations, the fees and expenses of the neutral arbitrator shall be paid one-half by the Claimants and one-half by the Respondents.

If the parties select party arbitrators, Claimants shall be responsible for paying the fees and expenses of their party arbitrator and Respondents shall be responsible for paying the fees and expenses of their party arbitrator.

Costs

Except for the aforementioned fees and expenses of the neutral arbitrator, and except as otherwise mandated by laws that apply to arbitrations under this "Binding Arbitration" section, each party shall bear the party's own attorneys' fees, witness fees, and other expenses incurred in prosecuting or defending against a claim regardless of the nature of the claim or outcome of the arbitration.

General provisions

A claim shall be waived and forever barred if (1) on the date the Demand for Arbitration of the claim is served, the claim, if asserted in a civil action, would be barred as to the Respondent served by the applicable statute of limitations, (2) Claimants fail to pursue the arbitration claim in accord with the Rules of Procedure with reasonable diligence, or (3) the arbitration hearing is not commenced within five years after the earlier of (a) the date the Demand for Arbitration was served in accord with the procedures prescribed herein, or (b) the date of filing of a civil action based upon the same incident, transaction, or related circumstances involved in the claim. A claim may be dismissed on other grounds by the neutral arbitrator based on a showing of a good cause. If a party fails to attend the arbitration hearing after being given due notice thereof, the neutral arbitrator may proceed to determine the controversy in the party's absence.

The California Medical Injury Compensation Reform Act of 1975 (including any amendments thereto), including sections establishing the right to introduce evidence of any insurance or disability benefit payment to the patient, the limitation on recovery for non-economic losses, and the right to have an award for future damages conformed to periodic payments, shall apply to any claims for professional negligence or any other claims as permitted or required by law.

Arbitrations shall be governed by this "Binding Arbitration" section, Section 2 of the Federal Arbitration Act, and the California Code of Civil Procedure provisions relating to arbitration that are in effect at the time the statute is applied, together with the Rules of Procedure, to the extent not inconsistent with this "Binding Arbitration" section. In accord with the rule that applies under Sections 3 and 4 of the Federal Arbitration Act, the right to arbitration under this "Binding Arbitration" section shall not be denied, stayed, or otherwise impeded because a dispute between a Member Party and a Kaiser Permanente Party involves both arbitrable and nonarbitrable claims or because one or more parties to the arbitration is also a party to a pending court action with a third party that arises out of the same or related transactions and presents a possibility of conflicting rulings or findings.

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Kaiser Foundation Health Plan, Inc.
Northern and Southern California Regions

A nonprofit corporation

Kaiser Permanente for Small Business Combined Evidence of Coverage and Disclosure Form for CaliforniaChoice

Kaiser Permanente Platinum HMO A
EOC Number: 1

Contract Year 2021

Member Service Contact Center
24 hours a day, seven days a week (except closed holidays)
1-800-464-4000 (TTY users call **711**)
kp.org

Attachment B

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Legal Department
393 E. Walnut St.
Pasadena, CA 91188

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Information about termination of pediatric dental coverage is described under "Pediatric Dental Coverage" in the "Introduction" section of this *EOC*.